ground in the light of my finding in respect of ground (2) I think it is appropriate for the sake of completeness that I address this point. What that paragraph states is that the respondent as a result of a report it had received had decided as the Disciplinary Authority concerned to take disciplinary action against the applicant with a view to dismissal under GO 26. What has to be emphasized is the fact that the action was being taken only with a view to dismissal under GO 26 which specifically lays down the procedure. That statement is then followed by the charge. It can only mean what it says and cannot be read as indicating that the respondent had already made up its mind to dismiss him without first considering his representation. It is clear from the provisions of this general order that a prima facie case has first to be made out from information it has received before an officer is called upon to answer the charge by way of a written representation. (See paragraph (2).) That was clearly what happened in the present case: upon receipt of a report the respondent decided (obviously after considering it) to call upon the applicant to answer the charge. It cannot and should not be inferred from the language of the introductory paragraph that, as contended by counsel, a decision had already been made to dismiss him from the service before he was asked to make his written exculpatory representation.

For the reasons given under ground (2), I make an order in terms of the application.

Application allowed.

Solicitors: *Zaman & Associates.*

Reported by *Zarinah Marican*

Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-345 OF 1986
JAMES FOONG JC
10 JANUARY 1991

Land Law — Sale by public auction — Whether rights of chargor cease before conclusion of sale — Failure of purchaser to make payment of balance within stipulated time — Whether purchaser entitled to extension of time to make payment under order of court for sale — Whether senior assistant registrar has power to vary the order for sale issued by judge – National Land Code 1965, ss 256 & 257

Land Law — Indefeasibility of title — Whether a purchaser who has breached the conditions of order for sale may be allowed to be the registered proprietor — National Land Code 1965, s 340

Civil Procedure — Parties — Joinder of party – Whether to dismiss application to vary order of sale where the parties did not apply to be joined in the original action — Rules of the High Court 1980, O 15 r 6

In this case, two appeals were brought against the decisions of the senior assistant registrar. Kim Ming Choon, the appellant, was the registered owner of a piece of property charged by him to Development & Commercial Bank Bhd, Johore Bahru ('D&C Bank') by way of a first legal charge. There was a default in repayment of the said loan and D&C proceeded with foreclosure proceedings against the said property. An order for sale was granted which consisted of various sub-orders, one of which was that the date of the sale should be fixed by the senior assistant registrar.

Subsequent to the order of sale on 17 January 1987, the senior assistant registrar of the High Court made a consequential order of sale which ordered the application of the Johor Conditions of Sale. One Yu Cheng Hee ('the bidder') successfully bid for the purchase of the said property at a public auction and paid 25% of the purchase price and the balance of the purchase price would have to be paid on 28 May 1988 ('the completion date') which was three months from the date of successful bid but subsequently he discovered that there was a caveat on the said property lodged by a third party, one Lee Thian Pah ('the caveator'), who purported to have entered into a sale and purchase agreement with the appellant for the purchase of the said property after the order for sale was granted.

Before the completion date, the bidder and his wife applied to the senior assistant registrar to have the completion date extended. This application bears exactly the same heading as the order for sale except for certain items. The registrar granted an order for extension to 12 April 1988. The appellant applied to set aside the said extension but his application was dismissed. The appellant then appealed to the High Court and this is the first appeal in this case.

While awaiting hearing of the first appeal, the bidder proceeded to appeal for further extension of time to complete the sale. On his third attempt the senior assistant registrar granted it. The appellant again applied to set aside this order for extension. The senior assistant registrar dismissed the application and the appellant appealed against the decision of the senior assistant registrar. This appeal forms the second appeal in this case. The bidder had since the filing of the second appeal by the appellant paid the balance of the purchase price

and by using one of the orders in the order for sale convinced the land office to transfer the said property to himself subject to the said caveat.

Held, allowing the appeals:

(1) Dealing with the first appeal, in the first application dated 5 March 1988 made by the bidder, the parties named are incorrect and there seems to be a total disregard not only of the Rules of the High Court 1980 relating to the parties to the action but it also included persons both as applicants and respondent who are not even parties to the original action. Moreover, there were no applications before the court to include any of these persons as parties in the action.

(2) The said application was made ex parte and it was only known to the bidder and his wife. The rights of D&C Bank as the chargee of the said property, the rights of the appellant as chargor and even that of the outsider, ie the caveator, were completely ignored.

(3) The chargor's rights under an order for sale by the court pursuant to ss 256 and 257 of the National Land Code 1965 are not completely lost when the order for sale is made. He abrogates his rights and powers to dispose of the said property to the chargee on condition that the sale of his property is carried out in accordance with the orders granted by the court under the order for sale and other consequential orders arising therefrom. In the event that the order for sale and the consequential orders are breached and, that the sale under such orders is aborted, his rights are restored pending fresh orders (if any).

(4) In this particular case the period of three months to complete the sale by payment of the balance of the purchase price from the date of the successful bid in a public auction is clearly stated in the order for sale. Any variation from this would affect the rights of the chargor as any delay in the completion of such sale would prejudice the chargor in having to bear further interest charges levied by the charge and therefore the chargor should be heard.

(5) The senior assistant registrar has no power to vary the orders for the sale issued by the learned judge in this case, for extension of time is a variation of the said order. Application for extension of time must therefore be by way of a variation of the said order for sale and as such must be heard before a judge.

(6) Although the bidder has obtained registration of title, the court has power under s 417 of the National Land Code 1965 to direct the collector or registrar to do all such things as may be necessary to give effect to its judgment and orders.

[Bahasa Malaysia summary

Dalam kes ini, dua rayuan dibawa terhadap keputusan-keputusan penolong kanan pendaftar. Kim King Choon ('perayu') tuanpunya tanah berdaftar sebuah harta yang dicagar olehnya kepada Development & Commercial Bank Bhd, Johore Bahru ('D&C' Bank) melalui gadaian undang-undang yang pertama. Terdapat satu keingkaran dalam pembayaran balik pinjaman tersebut dan D&C meneruskan prosiding sekat-tebusan terhadap harta tersebut. Suatu perintah jualan diberi yang mengandungi beberapa perintah sampingan, salah satu adalah bahawa tarikh untuk jualan ditetapkan oleh penolong kanan pendaftar.

Selepas perintah jualan pada 17 Januari 1987, penolong kanan pendaftar, Mahkamah Tinggi membuat perintah jualan berbangkit yang mengarahkan supaya Syarat-Syarat Jualan, Johor dipakai. Seorang penawar, Yu Cheng Hee ('penawar') telah berjaya menawar bagi pembelian harta tersebut dalam lelong awam dan membayar 25% harga pembeliannya dan baki harga pembelian sepatutnya dibayar pada 28 Mei 1988 ('tarikh penyempurnaan') iaitu tiga bulan daripada tarikh penawaran yang berjaya itu tetapi selapasnya dia mendapati bahawa terdapatnya satu kaveat atas harta tersebut yang dimasukkan oleh pihak ketiga, seorang Lee Thian Pah ('pengkaveat'), yang berkata telah memasuki satu perjanjian jual beli dengan perayu untuk membeli harta tersebut selepas perintah jualan diberi. Sebelum tarikh penyempurnaan itu, penawar dan isterinya memohon kepada penolong kanan pendaftar untuk tarikh penyempurnaan dilanjutkan. Permohonan ini menggunakan tajuk yang sama seperti perintah jualan kecuali untuk beberapa butiran. Pendaftar memberi perintah perlanjutan ke 12 April 1988. Perayu memohon untuk mengenepikan perlanjutan tersebut tetapi permohonannya ditolak. Kemudiannya, perayu merayu ke Mahkamah Tinggi dan inilah rayuan pertama dalam kes ini.

Sementara menunggu tarikh pendengaran rayuan pertama, penawar terus merayu bagi perlanjutan masa yang lanjut lagi untuk menyempurnakan jualan. Atas percubaan ketiga, penolong kanan pendaftar membenarkannya. Perayu sekali lagi memohon bagi mengenepikan perintah untuk perlanjutan. Penolong kanan pendaftar menolak permohonannya dan perayu merayu terhadap keputusan penolong kanan pendaftar. Rayuan ini merupakan rayuan kedua dalam kes ini. Penawar telah semenjak pemfailan rayuan kedua oleh perayu membayar baki harga pembelian dan dengan menggunakan perintah-perintah dalam perintah jualan meyakinkan pejabat tanah supaya memindahmilik harta tersebut kepada dirinya tertakluk kepada kaveat tersebut.

Diputuskan, membenarkan rayuan-rayuan itu:

(1) Berhubung dengan rayuan pertama, dalam permohonan pertama bertarikh 5 Mach 1988 yang dibuat oleh penawar, pihak-pihak yang dinamakan adalah salah dan nampaknya tidak dihiraukan langsung bukan sahaja, Kaedah-Kaedah Mahkamah Tinggi 1980 yang berkaitan dengan pihak-pihak kepada tindakan tetapi ia juga dimasukkan orang-orang, keduaduanya sebagai pemohon dan responden yang bukan pihak-pihak dalam tindakan asal pun. Lagipun, tidak ada permohonan di hadapan mahkamah untuk memasukkan sesiapa daripada orang-orang itu sebagai pihak-pihak dalam tindakan.

(2) Permohonan tersebut dibuat ex parte dan ianya diketahui oleh penawar dan isterinya sahaja. Hak-hak D&C Bank sebagai pemegang gadaian harta tersebut, hak-hak perayu sebagai penggadai dan juga pihak luar, yakni pengkaveat tidak dihiraukan langsung.

(3) Hak-hak penggadai di bawah perintah jualan oleh mahkamah menurut ss 256 dan 257 Kanun Tanah Negara 1965 tidaklah hilang langsung apabila perintah jualan dibuat. Dia hanya membatal hak dan kuasanya untuk melupus harta tersebut kepada pemegang gadaian atas syarat bahawa penjualan hartanya dilaksanakan mengikut perintah-perintah yang diberi oleh mahkamah di bawah perintah jualan dan lain-lain perintah yang berbangkit daripadanya. Sekiranya, perintah jualan dan perintah-perintah yang berbangkit daripadanya dimungkiri, dan bahawa penjualan di bawah perintah-perintah itu ditarik balik, hak-haknya dipulihkan sementara menunggu perintah-perintah baru (sekiranya ada).

(4) Dalam kes tertentu ini, tempoh tiga bulan untuk menyempurnakan jualan dengan pembayaran baki harga pembelian daripada tarikh tawaran yang berjaya dalam lelong awam dinyatakan dengan terang dalam perintah jualan. Sebarang pindaan daripadanya akan melibatkan hak-hak penggadai kerana sebarang kelambatan dalam penyempurnaan jualan

tersebut akan menjejaskan pemegang gadaian kerana terpaksa menanggung faedah lanjut yang dicaj oleh pemegang gadaian dan oleh itu, pemegang gadaian semestinya didengar.

(5) Penolong kanan pendaftar tidak ada kuasa untuk meminda perintah jualan yang dikeluarkan oleh yang arif hakim dalam kes ini, kerana perlanjutan masa adalah pindaan perintah tersebut. Permohonan untuk perlanjutan masa semestinya dibuat secara pindaan perintah jualan tersebut dan kerana itu mestilah didengar di hadapan seorang hakim.

(6) Walaupun penawar telah memperolehi pendaftaran hakmilik, mahkamah mempunyai kuasa di bawah s 417 Kanun Tanah Negara 1965 untuk mengarahkan pemungut atau pendaftar mengambil segala tindakan yang perlu bagi memberi kesan kepada penghakiman dan perintahnya.]

[*Editorial Note*: The bidder has appealed to the Supreme Court vide Civil Appeal No 02-7-1991 and 02-8-1991.]

Cases referred to

1 *Malayan United Finance Bhd, Johore Bahru* v *Liew Yet Lan* [1990] 1 MLJ 317 (folld)
2 *Siland Sdn Bhd & Anor* v *M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502 (folld)
3 *Sungei Biak Tin Mines Ltd* v *Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226 (folld)

Legislation referred to

National Land Code 1965 ss 256, 257, 340
Rules of the High Court 1980 O 15 r 6

David Ng Kim Seng for the chargee.
CH Ng for the appellant.
Wong Kim Fatt (*Ong Peck Ha (Mrs)* with him) for the bidder.
Nordin Husin for the caveator.

Cur Adv Vult

James Foong JC: There are two appeals in this case. These two appeals are against the decisions of the senior assistant registrar. The first appeal is found in encl 47 and the second appeal is in encl 68. Both these appeals arise from the same sequence of facts.

The facts of this case are as follows. A person by the name of Kim Ming Choon ('Kim'), the appellant in this case, was registered owner of a piece of property held under HS(D) 41832, PTD 19847 situated in the mukim of Plentong in the District of Johore Bahru, consisting of an area of 1,848 sq ft and on which a double-storey terrace house is erected thereon known as No 56, Jalan Sri Pelangi, Taman Pelangi, Johore Bahru (all of which shall hereinafter be referred to as the 'said property').

The said property was charged by Kim to Development & Commercial Bank Bhd, Johore Bahru ('D&C Bank') by way of a first legal charge in consideration of a loan granted by D&C Bank. There was a default in repayment of the said loan and D&C Bank proceeded with the foreclosure proceedings against the said property.

On 29 September 1986 the Honourable Mr Justice Shankar granted an order for sale. (This order shall hereinafter be referred to as 'the order for sale'.)

The said order for sale consists of (as is the usual case) various sub-orders. I shall highlight herein some of the orders made in the order for sale:

(1) That the said land 'be sold by public auction under s 256 and s 257 of the National Land Code 1965 to satisfy the sum of $233,038.93 as at date of order and further interest thereon at the prescribed rate currently in force to the time of sale or satisfaction thereof.
(2) And it is also ordered that the date of the sale shall be fixed by the senior assistant registrar of this honourable court.
(3) And it also further ordered that the conditions of sale be varied to all the successful purchasers to pay the balance of the purchase price of the land within a period of three (3) months of the payment of the initial deposit of 25%.

Subsequent to the order of sale the usual summons-for-directions followed and on 17 January 1987 the senior assistant registrar of the High Court, Johore Bahru made an order setting out the detail procedure of how the sale of the said property should be conducted. This order of the senior assistant registrar dated 17 January 1987 shall hereinafter be referred to as the consequential orders of sale.

The consequential orders of sale para (f) ordered:

> That conditions of sale be Johore Conditions of Sale where applicable and the appointed auctioneer do prepare the same.

On 28 February 1988 one Yu Cheng Hee ('the bidder') successfully bid for the purchase of the said property at a public auction and a memorandum of contract for this purchase was entered into between him and the appointed auctioneer. The bidder paid 25% of the purchase price and the balance of the purchase price would have to be paid on 28 May 1988 ('the completion date') which was three months from the date of successful bid.

The bidder proceeded to apply for a bank loan to finance his purchase. In the course of doing so he discovered that there was a caveat on the said property levied by a third party, one Lee Thian Pah (hereinafter shall be referred to as 'the caveator') who purported to have entered into a sale and purchase agreement with Kim for the purchase of the said property after the order for sale was granted.

Before the completion date, the bidder and his wife, one Chin Sar Lee, applied to the senior assistant registrar to have the completion date extended. This application before the senior assistant registrar bears exactly the same heading as the order for sale except for :

(a) an additional heading — 'In the Matter of the Private Caveat entered on the 16th day of February 1988 by Lee Thian Pah in respect of the above stated property'; and
(b) the parties are not the same. In this application D&C Bank's name is missing and substituted as applicants are the name of the bidder and that of his wife, Chin Sar Lee. The respondent's name in this application was also changed to Lee Thian Pah, the caveator.

Further, this application was as admitted by the parties in this appeal made ex parte. In consequence of this application, the senior assistant registrar on 21 March 1988 granted an order for the bidder and his wife to extend the completion date and pay the balance of the purchase price six months from 28 February 1988 instead of three months.

On 12 April 1988, Kim got to know of the extension granted on the completion date and applied to set aside the decision of the senior assistant registrar dated 21 March 1988.

On 16 August 1988 the senior assistant registrar dismissed Kim's application to set aside. Dissatisfied with this decision, Kim appealed to this honourable court and this forms the first appeal in this case.

While awaiting hearing of the first appeal, the bidder proceeded to appeal for further extension of time to complete the sale. On his third attempt the senior assistant registrar granted further extension of time to complete the sale and to pay the balance of the purchase price.

Kim again applied to set aside this order for extension. The senior assistant registrar dismissed the application and Lee applied to this honourable court against the decision of the senior assistant registrar. This appeal hence forms the basis of the second appeal in this case.

In order of priority this court shall first deal with the first appeal. In the first instance, the first application dated 5 March 1988 made by the bidder for the extension of time to complete the sale, (which application shall hereinafter be referred to as the 'said application') the parties named there are incorrect. In the said application there seems to be a total disregard of the Rules of the High Court 1980 relating to parties to an action. It included persons both as applicants and respondent who are not even parties to the original action.

The parties in the original order for sale are D&C Bank and the applicant and Kim as the respondent. In the said application both D&C Bank and Kim's name were left out completely. Instead the bidder's name was included together with that of his wife, Chin Sar Lee. They were named as the applicants. As for the respondent, Lee Thian Pah, the caveator, was named.

The presence of all the aforesaid parties in the said application are all foreign to the original action. There were no applications before the court to include any of these people as parties in the action though provided for, with leave of court under O 15 r 6 of the Rules of the High Court 1980.

Secondly, not only were the names of the parties in the original action not included, the said application was made ex parte. In short, when the order for extension of time to complete the sale was made on 21 March 1988 it was only known to the bidder and his wife. The rights of the D&C Bank as the chargee of the said property, the rights of Kim the chargor and even the outsider the caveator were completely ignored.

It was argued by the bidder, the respondent in this appeal, that the rights of Kim as chargor of the said property ceases when the order for sale was made. The case of *Malayan United Finance Bhd, Johore Bahru* v *Liew Yet Lan*[1] was cited in support.

With greatest respect I agree with the aforesaid decision. However I wish to add that the chargor's rights under an order for sale by the court pursuant to ss 256 and 257 of the National Land Code 1965 are not completely lost when the order for sale is made. He abrogates his rights and power to dispose of the said property to the chargee on condition that the sale of his property is carried out in accordance with the orders granted by the court under the order for sale and other consequential orders arising therefrom.

In the event that the order for sale and the consequential orders are breached and, that the sale under such orders is aborted, his rights are restored pending fresh orders, (if any).

In this particular case the period of three months to complete the sale by payment of the balance of the purchase price from date of the successful bid in a public auction is clearly stated in the order for sale. Any variation from this would affect the rights of the chargor and he should be heard.

I am in total agreement with the Honourable Judicial Commissioner Mr Richard Tallala in the case of *Siland Sdn Bhd & Anor* v *M & J Frozen Food Sdn Bhd & Anor*[2] which case was cited during this hearing. As expressed therein any delay in the completion of such sale would prejudice the chargor in having to bear further interest charges levied by the chargee.

Thirdly, this court is of the view that the senior assistant registrar has no power to vary the orders for sale issued by the learned judge in this case. Extension of time is a variation of the said order for sale when the same clearly states the period of three months from date of a successful bid to complete the sale. Application for the extension of time must therefore be by way of a

variation of the said order for sale and as such must be heard before a judge.

During the hearing of this appeal, learned counsel for the bidder informed this court that the said property is now registered in the name of the bidder as the registered proprietor. The bidder had since the filing of the second appeal by Kim paid the balance of the purchase price and by using one of the orders in the order for sale convinced the Land Office to transfer the said property to himself subject to the said caveat.

As such it was argued that under s 340 of the National Land Code 1965 the title of a registered proprietor is indefeasible once registered except for fraud and misrepresentation.

This court rejects such a contention. To accept the same would restrict the court to do justice and to allow the bidder to be the registered proprietor when he in fact has breached the terms and conditions of sale. As stated in the case of *Sungei Biak Tin Mines Ltd* v *Saw Choo Theng & Anor (No 2)*[3] of the National Land Code 1965 to direct the collector or registrar to do all such things as may be necessary to give effect to its judgments or orders. To quote Tun Suffian LP in the same case:

> If we did not order the collector to remove Mr Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr Lee to thumb their noses at a judgment of the Federal Court and I do not think we should allow that.

Though it was argued by learned counsel for the bidder that he was an innocent purchaser at a public sale not aware of a caveat so imposed on the said property, this court finds the bidder proceeded on to bid for the purchase with his eyes opened.

Under the consequential orders arising from the order for sale, the Johore Conditions of Sale was used as the terms and conditions of the public auction sale. These terms and conditions were made known to the bidder and he agreed to abide by it.

Under cl 12 of the Johore Conditions of Sale it is clearly stated that:

> the said property is sold subject to all existing leases, tenancies, caveats and occupancies and the right of claim of any tenant or occupiers thereunder and the purchasers shall be deemed to have full knowledge of the state and conditions of the property.

Under such circumstances the bidder should have been more careful to check on the said property as to whether there were any caveats thereon.

In this case, as stated in the terms and conditions of sale, he buys with any encumbrances thereon.

Clause 21 of the Johore Conditions of Sale provides for forfeiture of the deposits and initial payment of the bidder if he fails to complete the sale on time by paying the balance of the purchase price.

At the time set for the completion of sale under the order for sale, the bidder failed to make payment. Under such circumstances, he is in breach of the terms and conditions of sale and as such his deposit and initial payment would have to be forfeited and the sale annulled.

In view of the grounds as stated aforesaid this court allows the appellant's first appeal as follows:

(1) the sale to the bidder, Yu Cheng Hee, at the public auction on 28 February 1988 to be treated as aborted;
(2) the deposit and part payment of $32,000 so paid by the bidder be forfeited to the chargee D&C Bank towards the account of the chargor to set off the outstanding sum due by the chargor to the chargee;
(3) the balance of the purchase price be refunded to the bidder;
(4) that the Director of Lands and Mines do remove the name of the bidder from the Register of Titles to the said property and re-enter the name of the appellant therein and that all costs and expenses relating to this to be borne by the bidder;
(5) cost of this appeal to the appellant.

As for the second appeal this order also allows the same with cost.

Appeals allowed.

Solicitors: *Lim & Hooi; Leng & Co; Ong & Ong; Tia & Nordin.*

Reported by *Zarinah Marican*